(3)

No. 85-1370

Supreme Court, U.S.
FILED
AUG 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

ARKANSAS WRITERS' PROJECT, INC.,

Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

JOINT APPENDIX

ANNE OWINGS WILSON
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APPEAL DOCKETED February 14, 1986
PROBABLE JURISDICTION NOTED, May 19, 1986

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*The Decision of Arkansas Commissioner of Revenues denying Plaintiff's claim for refund (March 9, 1984) appears in the Appendix to the Jurisdictional Statement at pp. 12-14. The Opinion Letter of the Chancery Court for Pulaski County (March 29, 1985) appears in the Appendix to the Jurisdictional Statement at pp. 14-17. The Order of the Chancery Court for Pulaski County (April 15, 1985) appears in the Appendix to the Jurisdictional Statement at pp. 17-18. The Opinion of the Arkansas Supreme Court reversing the Chancery Court of Pulaski County, Arkansas (October 14, 1985) appears in the Appendix to the Jurisdictional Statement at pp. 9-11. The Supplementary Opinion on Rehearing of the Arkansas Supreme Court (November 18, 1985) appears in the Appendix to the Jurisdictional Statement at pp. 11-12.

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RELEVANT DOCKET ENTRIES IN THE COURT BELOW

I. *Chancery Court of Pulaski County, Arkansas*

March	28, 1984	Complaint of Arkansas Writers' Project, Inc.
April	9, 1984	Answer by Charles D. Ragland, Commissioner of Revenue of the State of Arkansas
August	21, 1984	Plaintiff's Motion for Summary Judgment
August	31, 1984	Defendant's Reply to Plaintiff's Motion for Summary Judgment
October	29, 1984	Order of the Chancery Court of Pulaski County Arkansas granting Plaintiff's Protective Order to review certain of defendant's documents
January	25, 1985	Joint Stipulation
March	29, 1985	Chancery Court's Letter Opinion
April	15, 1985	Order of the Chancery Court of Pulaski County Arkansas
April	18, 1985	Notice of Appeal by Defendant from Order of Chancery Court of Pulaski County, Arkansas
April	22, 1985	Notice of Cross Appeal by Plaintiff from Order of Chancery Court of Pulaski County, Arkansas

II. *Arkansas Supreme Court*

October	14, 1985	Opinion of Arkansas Supreme Court reversing the Chancery Court of Pulaski County, Arkansas

October	27, 1985	Appellee's Petition for Rehearing
October	28, 1985	Appellant's Response to Petition for Rehearing
November	18, 1985	Arkansas Supreme Court's Supplementary Opinion Denying Rehearing
November	18, 1985	Chancery Mandate Issued
February	12, 1986	Notice of Appeal to United States Supreme Court

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS

ARKANSAS WRITERS' PROJECT, INC.,

Plaintiff,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS,

Defendant.

COMPLAINT

(Filed March 28, 1984)

Comes the Plaintiff, Arkansas Writers' Project, Inc., by its attorneys House, Wallace & Jewell, P.A., and for its appeal from the decision of the Commissioner of Revenues of the State of Arkansas alleges and states:

1. The Plaintiff, Arkansas Writers' Project, Inc., is a corporation organized and existing by virtue of the laws of the State of Arkansas and having its principal place of business in Little Rock, Pulaski County, Arkansas.

2. This Court has jurisdiction of this appeal by virtue of Ark. Stat. Ann. § 84-4726 and the taxpayer's residence in Pulaski County, Arkansas.

3. The Plaintiff, Arkansas Writers' Project, Inc., publishes, distributes and sells the *Arkansas Times Magazine*. These sales take the form of: (a) sales to vendors for resale, (b) sales by subscriptions delivered by mail, and (c) sales through newspaper boxes. All of the above sales should be exempt from liability for sales tax pursuant to Ark. Stat. Ann. § 84-1904(f) and § 84-1904(j), but the Defendant has consistently taken the position that they are not exempt. Furthermore, failure to construe

the exemption provided in Ark. Stat. Ann. § 84-1904(f) and (j) to include sales of *Arkansas Times* violates the Plaintiff's rights under the Arkansas Constitution and the United States Constitution, and is a deprivation of Plaintiff's civil rights actionable under 42 U.S.C. § 1983.

4. The taxpayer has previously (for the years 1979-1982) been assessed Sales Tax liability for its sales of the *Arkansas Times Magazine.* The taxpayer protested the imposition through the stage of filing a Complaint in this Court (Chancery No. 80-4626). The parties settled the lawsuit in August, 1982. As part of the settlement, the taxpayer agreed to pay sales tax on the magazine unless the statute was changed or unless an appellate court issued a ruling affecting the validity of taxing sales of the magazine. It has paid these taxes itself and has not passed them on to its purchasers. These payments were made due to a mistake in the law (see Ark. Stat. Ann. § 84-4726). In March, 1983, the United States Supreme Court issued its opinion in the case of *Minnesota v. Minneapolis Star and Tribune Company,* — U. S. —, 75 L. Ed. 2d 295 (1983). This case stands for the proposition that tax exemptions which discriminate between publications are illegal as being violative of the First Amendment and the Fourteenth Amendment to the United States Constitution.

5. On January 20, 1984, *Arkansas Times* filed its claim for refund with the Defendant asking for a refund of taxes from October 1, 1982, to the present and until resolution of the matter. The matter was heard by the

Commissioner on briefs and affidavits, and on March 9, 1984, the Commissioner issued his ruling that the *Arkansas Times* was not entitled to a tax exemption. It is from this decision that this appeal is made in accordance with Ark. Stat. Ann. § 84-4726.

6. The Defendant's interpretation of the exemptions contained in Ark. Stat. Ann. § 84-1904(f) and § 84-1904(j) discriminates between publications and is therefore illegal under the principles set forth in the *Minnesota v. Minneapolis Star and Tribune Company,* cited in paragraph 4 above. Ark. Stat. Ann. § 84-1904(f) and (j) may be construed in a constitutional manner, and such a construction would allow *Arkansas Times* a sales tax exemption.

7. The taxpayer has exhausted its administrative remedies, and this appeal is proper.

8. This lawsuit is brought pursuant to the Civil Rights Act, 42 USC § 1983, since it is state action infringing the Arkansas Writers' Project's right to freedom of speech and freedom from discrimination granted by Amendments 1 and 14 to the United States Constitution. Therefore, the Plaintiff is entitled to attorney's fees under 42 USC § 1988.

WHEREFORE, the Plaintiff prays for an Order directing the Commissioner to refund to it taxes paid since October 1, 1982, through the date of the refund, with interest, Court costs, and full attorney's fees, pursuant to 42 USC § 1988, a declaratory judgment that sales of *Arkansas Times* are exempt from sales tax, and all other relief to which Plaintiff may be entitled.

Arkansas Writers' Project, Inc.
By Its Attorneys
/s/ Anne Owings Wilson
House, Wallace & Jewell, P.A.
1550 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
4TH DIVISION

ARKANSAS WRITERS' PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF
REVENUE OF THE STATE OF ARKANSAS

Defendant

ANSWER

(Filed April 9, 1984)

Comes the Defendant, Charles D. Ragland, Commissioner of Revenues of the State of Arkansas, by his solicitors, and for his answer to the Complaint of Plaintiff, Arkansas Writers' Project, Inc., states:

(1) That Defendant admits the allegations and statements contained in paragraphs 1 and 2 of the Complaint filed herein.

(2) That Defendant admits that portion of paragraph 3 which states "the Plaintiff, Arkansas Writers' Project, Inc., publishes, distributes and sells the *Arkansas Times Magazine*" and that portion which states that the Defendant has consistently taken the position that the sale of the *Arkansas Times Magazine* is not exempt from the Arkansas Gross Receipts (Sales) Tax but denies each and every other material statement and allegation contained in said paragraph 3 of the Complaint filed herein.

(3) That Defendant admits that portion of paragraph 4 which states "the taxpayer has previously (for the years 1979-82) been assessed sales tax liability for its sales of the *Arkansas Times Magazine*. The taxpayer protested the imposition through the stage of filing a Complaint in this Court (Chancery No. 80-4626). The parties settled this lawsuit in August, 1982. As a part of the settlement, the taxpayer agreed to pay sales tax on the magazine unless the statute was changed or unless an appellate court issued a ruling affecting the validity of taxing sales of the magazine" and that "In March, 1983, the United States Supreme Court issued its opinion in the case of *Minnesota v. Minneapolis Star and Tribune Company*" but denies each and every other material allegation and statement contained in said paragraph 4 of the Complaint filed herein.

(4) That Defendant admits the allegations and statements contained in paragraph 5 of the Complaint filed herein.

(5) That Defendant denies each and every material allegation contained in paragraph 6 of the Complaint filed herein.

(6) That Defendant admits that portion of paragraph 7 which states "the taxpayer has exhausted its administrative remedies" but denies the other statement contained in said paragraph 7 of the Complaint filed herein.

(7) That Defendant denies each and every material allegation contained in paragraph 8 of the Complaint filed herein and, pleading in the affirmative, states that an action brought pursuant to the Civil Rights Act, 42 USC §1983 and 42 USC §1988 lies within the exclusive jurisdiction of the United States Federal Courts and that this Court is without jurisdiction to consider same.

WHEREFORE, having fully answered, Defendant, Charles D. Ragland, Commissioner of Revenues of the State of Arkansas, prays that the Complaint of the Plaintiff, Arkansas Writers' Project, Inc., be dismissed, for his costs expended herein and for all other relief to which he is entitled.

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUES
OF THE STATE OF ARKANSAS
/s/ Joseph V. Svoboda
Attorney for Defendant
P.O.Box 1272-L
Little Rock, Arkansas 72201
(501) 371-2451

CERTIFICATE OF SERVICE

1, Joseph V. Svoboda, certify that I have served a copy of the foregoing Answer upon Anne Owings Wilson, Attorney for Plaintiff, 1550 Tower Building, Little Rock, Arkansas 72201, by placing same in the United States mail, postage prepaid, on this 5th day of April, 1984.

/s/ Joseph V. Svoboda

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No: 84-1268

ARKANSAS WRITERS' PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF
REVENUE OF THE STATE OF ARKANSAS

Defendant

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Aug. 21, 1984)

Comes the Plaintiff, Arkansas Writers' Project, Inc., d/b/a Arkansas Times Magazine, and for its Motion for Summary Judgment, states:

1. Attached is an Affidavit which sets forth the relevant facts which would have been presented in a trial of this matter.

2. Such facts conclusively establish that Arkansas Times has been subjected to discriminatory taxation which violates its First and Fourteenth Amendment Rights.

3. Arkansas Times should be exempt from sales taxes pursuant to Ark. Stat. Ann. §84-1904(f), which exempts newspapers, and Ark. Stat. Ann. § 84-1904(j), which exempts "religious, professional, trade and sports journals and/or publications printed and published within this state . . . when sold through regular subscriptions".

4. Defendant has consistently taken a position contrary to the Constitution and the Statutes quoted above, and Plaintiff has been forced to bring this lawsuit to vindicate its Constitutional rights. Defendant's action is "state action" as defined in 42 USC §1983, and Plaintiff is entitled to its costs and attorneys fees pursuant to 42 USC §1988 ("Civil Rights Attorneys Fees Awards Act").

5. This Court is the only Court having jurisdiction over this cause of action, including the §1983 and §1988 claims, because of 28 USC §1341, which states "The [United States] district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state".

WHEREFORE, Plaintiff prays that this Court find that its sales be exempt from Arkansas sales tax; in the alternative that its subscription sales be exempt from sales tax, and that it be awarded a refund of all taxes paid from October 1, 1982 to date of judgment, interest, court costs, attorneys fees, and all other amounts to which Plaintiff may be entitled.

Respectfully submitted,
HOUSE, WALLACE & JEWELL, P.A.
1500 Tower Building
Little Rock, AR 72201
(501) 375-9151
By: /s/ Anne Owings Wilson
Attorneys for Arkansas
Writers' Project, Inc.

AFFIDAVIT

(Filed Aug. 21, 1984)

STATE OF ARKANSAS
COUNTY OF PULASKI

Before the undersigned, Notary Public, duly qualified and acting in and for said county and state, appeared Alan Leveritt, personally known to me to be the affiant herein, who stated the following under oath:

1. My name is Alan Leveritt, my address is P.O. Box 34010, Little Rock, Arkansas, and I am the Publisher for the *Arkansas Times Magazine.* ("Times"), a copy of which is attached.

2. The *Times* is a monthly publication.

3. The *Times* derives receipts from two sources—sales of advertising and sales of copies.

4. The current single-copy price is $1.75 per copy and the current yearly subscription rate (for twelve copies) is $10.95.

5. The *Times* has approximately 23,000 subscribers, sells approximately 5,000 single copies per month through coin-operated stands and to vendors for re-sale over-the-counter.

6. The content and readership of the *Times* are similar to daily newspapers such as the *Arkansas Gazette,* a copy of which is attached. Both contain articles concerning sports, religion, political and social events, etc.

7. The *Times* competes with daily newspapers for the same advertising dollars.

8. The *Times* and daily newspapers make sales to readers through identical channels. These include subscriptions, stand sales and over-the-counter sales.

9. The postage rate for the *Times* and daily newspapers is identical.

10. As publisher of a general interest magazine sold throughout the state, I am familiar with all periodicals published within the state of Arkansas. Most of these publications are newspapers. However, there are a few magazines published in Arkansas. No publication printed inside (or outside) Arkansas is taxed in Arkansas in its subscription or vending machine sales except for *Arkansas Times. Arkansas Times'* economic well-being, and hence its ability to continue publishing contrasting or critical views on politics, religion, sports, and business, is impeded by the imposition of a discriminatory sales tax.

11. The listing of sales tax which the *Arkansas Times* has paid is attached hereto and is a true and correct copy.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of August, 1984, in Little Rock, Arkansas.

s/ Alan Leveritt

SUBSCRIBED AND SWORN to before me this 16th day of August, 1984.

/s/ Marilyn Lively

Notary Public

MY COMMISSION EXPIRES:

7-1-91

Date	State Tax	Local Tax	Total Paid to the State
10-82	481.10	72.00	553.10
11-82	622.15	93.37	715.52
12-82	431.27	64.98	496.25
1-83	510.91	79.01	589.92
2-83	264.63	42.06	306.69
3-83	1,103.64	187.70	1,291.34
4-83	433.82	69.58	503.40
5-83	350.26	57.88	408.14
6-83	347.96	57.35	405.31
7-83	404.13	67.74	471.87
8-83	408.13	68.32	476.45
9-83	780.92	131.48	912.40
10-83	935.42	161.14	1,096.56
11-83	1,250.98	164.96	1,415.94
12-83	854.24	116.27	970.51
1-84	834.57	136.41	970.98
2-84	734.72	125.32	860.04
3-84	655.63	116.28	771.91
4-84	570.17	105.33	675.50
5-84	493.21	95.57	588.78
6-84	499.27	85.88	585.15
7-84	655.25	117.21	772.46
	13,622.38	2,215.84	15,838.22

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

Case No. 84-1268

ARKANSAS WRITERS' PROJECT, INC.
Plaintiff

v.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF STATE OF ARKANSAS
Defendant

DEFENDANT'S REPLY TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant, Charles D. Ragland, Commissioner of Revenue of the State of Arkansas, and for his reply to the Motion for Summary Judgment of the Plaintiff, Arkansas Writers' Project., Inc., states:

(1) Plaintiff's Motion states that the *Arkansas Times* magazine should be found exempt by the Defendant from Arkansas sales tax pursuant to (1) Ark. Stat. Ann. § 84-1904(f), which exempts newspapers and/or (2) Ark. Stat. Ann. § 1904(j) which exempts religious, professional, trade and sports publications printed and published within this state when sold through regular subscriptions. Plaintiff further contends that by denying either or both of the foregoing exemptions, the Defendant is violating Plaintiff's constitutional rights under the First and Fourteenth Amendment. In support of this Motion, Plaintiff

has attached the affidavit of Allen Leveritt, publisher for the *Arkansas Times* magazine.

(2) That even though Ark. Stat. Ann. § 84-1904(f) exempts only "newspapers", Plaintiff has never stated that the *Arkansas Times* magazine is, in fact, a newspaper. In the original complaint filed in this action, the Motion for Summary Judgment and the affidavit of Allen Leveritt, all that is alleged is that the *Arkansas Times* magazine has certain similarities with daily newspapers. Whether the *Arkansas Times* magazine is a newspaper per se is a material fact to grant the relief prayed by Plaintiff and certainly is a genuine issue as to a material fact still controvert and thus Plaintiff is not entitled to a judgment as a matter of law and a Motion for Summary Judgment under Rule 56 of the Arkansas Rules of Civil Procedure is inappropriate.

(3) Plaintiff has also alleged that the sale of the *Arkansas Times* magazine should be exempt under Ark. Stat. Ann § 84-1904(j) which applies to "religious, professional, trade and sports journals and/or publications printed and published within this state when sold through regular subscriptions". While admitting that the *Arkansas Times* magazine is a publication printed and published within this state and that a portion of its sales, but not all, is sold through regular subscriptions, Defendant has affirmatively denied in his Answer that it is a religious, professional, trade or sports publication. This exemption could only be claimed on the portion of Plaintiff's sales made through regular subscriptions and yet Plaintiff has admitted not all sales on which relief is claimed was made

in this manner. The amount of tax entailed is not known or shown by Plaintiff's pleading. Furthermore, Plaintiff has not stated in the original Complaint, its Motion or in the affidavit of Allen Leveritt that it is a religious, professional, trade or sports publication but rather that it is a monthly publication which contains articles concerning sports, religion, political and social events. Again, the pleadings and affidavit demonstrates the existence of a genuine issue as to a material fact still controverted and thus Plaintiff is not entitled to a judgment as a matter of law under Rule 56 of the Arkansas Rules of Civil Procedure.

(4) Pursuant to the attached affidavit filed on the behalf of the Defendant, Defendant denies the amount of sales tax alleged to have been paid in the affidavit of Allen Leveritt which demonstrates there is a genuine issue as to a material fact still controverted and the Plaintiff is not entitled to a judgment as a matter of law and a Motion for Summary Judgment under Rule 56 of the Arkansas Rules of Civil Procedure is inappropriate.

(5) Plaintiff is alleging entitlement to an exemption from tax and has the burden of proving entitlement beyond all doubt. If there is any doubt then the exemption must be denied to the one claiming it. *Southern Steel and Wire v. Wooten,* 276 Ark. 37, 631 S.W.2d 835 (1982), *Qualls v. Georgia Pacific Corp.,* 269 Ark. 426, 602 S.W.2d 646 (1980).

WHEREFORE, Defendant prays this Court deny Plaintiff's Motion for Summary Judgment and for all relief prayed for in Defendant's Answer filed in this cause of action.

Respectfully submitted

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUE
FOR THE STATE OF ARKANSAS
/s/ Joseph V. Svoboda, Attorney
Office of Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, AR 72203
371-2451

AFFIDAVIT

STATE OF ARKANSAS
COUNTY OF PULASKI

Before the undersigned notary public, duly qualified and acting in and for said County and State, appeared H. Gail Price, personally known to me to be the Affiant herein, who stated the following under oath:

(1) My name is H. Gail Price and I am the manager of the Sales and Use Tax Section for the Revenue Division of the Department of Finance and Administration for the State of Arkansas and have served in such capacity for a period of 11 years.

(2) In my capacity as manager I am responsible for the receipt, review and preservation of all tax reports and payments made under the Arkansas Gross Receipts Tax Act.

(3) The only publications that are exempt from Arkansas Gross Receipts Tax are newspapers and religious, professional, trade and sports publications which are printed and published within this State and sold through regular subscriptions. All other publications sold within the State of Arkansas would be subject to the Arkansas Gross Receipts Tax Act.

(4) According to the records received and maintained by my office, the *Arkansas Times* has not paid Arkansas Gross Receipts Tax in the amount of $15,838.22 during the period October 1982 through July of 1984.

(5) To my personal knowledge the *Arkansas Times* is not the only publication printed and published within Arkansas and sold through regular subscriptions which is taxed under the Arkansas Gross Receipts Tax Act.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th day of August, 1984, in Little Rock, Arkansas.

/s/ H. Gail Price

SUBSCRIBED AND SWORN TO BEFORE ME THIS 30th DAY OF AUGUST, 1984.

/s/ Lisa F. Walker
Notary Public

MY COMMISSION EXPIRES:
1-13-92

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 84-1268

ARKANSAS WRITERS' PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS

Defendant

JOINT STIPULATIONS

(Filed January 25, 1985)

Comes now the Plaintiff, Arkansas Writers' Project, Inc., and the Defendant, Charles D. Ragland, Commissioner of Revenues of the State of Arkansas, by their attorneys, and jointly stipulate to the following facts in this cause of action:

STIPULATION I: The Arkansas Times Magazine is a general interest magazine that is printed and published monthly in the State of Arkansas and is sold through mail subscriptions, coin operated stands and to vendors for re-sale over-the-counter.

STIPULATION II: The Arkansas Times Magazine is not a "newspaper" nor a "religious, professional, trade or sports journal".

STIPULATION III: Defendants allows for an exemption from Arkansas Gross Receipts (Sales) Tax for only "newspapers" and excludes magazines from the tax exemption contained in Ark. Stat. Ann. §84-1904(f).

STIPULATION IV: Defendants allows for an exemption from Arkansas Gross Receipts (Sales) Tax for only "religious, professional, trade and sports journals which are printed and published within Arkansas when such journals are sold through regular subscriptions" and excludes general interest magazines regardless of where printed, published and whether sold through regular subscriptions from the exemption contained in Ark. Stat. Ann. §84-1904(j).

STIPULATION V: The Plaintiff claims the interpretation by the Defendant of the exemptions contained in Ark. Stat. Ann. §84-1904(f) and (j) violates the Plaintiff's First and Fourteenth Amendment rights under the U. S. Constitution in that it discriminates between different types of magazines and also between newspapers, as one type of publication and all other periodicals.

STIPULATION VI: During the period covered by Plaintiff's request for refund of sales tax paid, Plaintiff has paid Defendant the sum of $15,838.22.

STIPULATION VII: The parties submit this case to the court upon the pleadings, briefs, this joint stipulation and reserve the right to a future hearing, if necessary, in order for the court to hear testimony concerning the amount of attorneys' fees under 42 USC §1988 to the Plaintiff.

ARKANSAS WRITERS'
PROJECT, INC.
/s/ Anne Owings Wilson

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUES
FOR THE STATE OF ARKANSAS
By: /s/ Joseph V. Svoboda

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 84-1268

ARKANSAS WRITERS' PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF
REVENUE OF THE STATE OF ARKANSAS

Defendant

NOTICE OF APPEAL
AND
DESIGNATION OF RECORD

(Filed April 18, 1985)

Notice is hereby given that defendant, Charles D. Ragland, Commissioner of Revenues for the State of Arkansas, appeals to the Supreme Court of Arkansas from the Decree dated and entered in this action on April 15, 1985. This case is among those over which jurisdiction was reserved by the Supreme Court in Rule 29(1)(c) of the Rules of the Supreme Court because it involves an interpretation or construction of an Act of the General Assembly.

Appellant designates as the record on appeal the entire record, including all pleadings, stipulations, orders, decrees and other documents filed in the court file.

The transcript has been ordered from Bill McFarland, Fourth Division Chancery, Pulaski County Courthouse, Little Rock, Arkansas 72201, Court Reporter of the proceedings in this case.

GIVEN THIS 16th DAY OF APRIL, 1985.

CHARLES D. RAGLAND
COMMISSIONER OF REVENUE
FOR THE STATE OF ARKANSAS

By: /s/ Joseph V. Svoboda
Attorney for Defendant

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 84-1268

ARKANSAS WRITERS'
PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF
REVENUE OF THE STATE OF ARKANSAS

Defendant

NOTICE OF CROSS APPEAL

(Filed April 22, 1985)

Notice is hereby given that Plaintiff, Arkansas Writers' Project, Inc., hereby appeals from the Decree dated and entered on April 15, 1985, and particularly from the Court's refusal to consider the issue of awarding attorneys' fees to Plaintiff pursuant to the Civil Rights Attorneys Fees Statute (42 U.S.C. § 1988).

Appellee/Cross-Appellant designates as the record on appeal the entire record, including all pleadings, stipulations, orders, decrees and other documents filed in the court file, all of which have been designated and ordered by Appellant.

Given this 22 day of April, 1985.

HOUSE, WALLACE,
NELSON & JEWELL, P.A.
1500 Tower Building
Little Rock, AR 72201
BY: /s/ Anne Owings Wilson
Attorney for Plaintiff

IN THE SUPREME COURT OF ARKANSAS

NO: 85-115

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUES

Appellee

VS.

ARKANSAS WRITERS' PROJECT, INC.

Appellant

PETITION FOR REHEARING

(Filed October 27, 1985)

This Petition For Rehearing is filed by the Appellee/Cross Appellant, Arkansas Writers' Project, Inc., referred to as *Arkansas Times*. In its opinion, the Court states ". . . neither party has questioned the constitutionality of the [tax] exemption . . ." This statement is wrong. The Court has apparently overlooked many of the major arguments made by both sides in this proceeding.

In addition, the Court stated ". . . our disposition of the direct appeal makes it unnecessary for us to reach the cross-appeal." This statement is also incorrect, as the cross-appeal was based on the constitutional arguments and not on the points considered by the Court.

Arkansas Times brought this case for refund of sales taxes paid because the Commissioner of Revenues taxed sales of its magazine, while sales of newspapers and certain types of magazines (religious, sports, professional and trade journals) were exempted. It had two primary arguments, first, that discrimination against one type of publication and in favor of another was unconstitutional

because violative of free speech, free press and equal protection, and second, that one of the sales tax exemptions could be construed to include sales of *Arkansas Times*.

The Chancellor in the Court below construed that exemption to include *Arkansas Times,* and found it unnecessary to rule on the constitutional issues. The Commissioner of Revenues appealed from the decision of Chancellor below, and the *Arkansas Times* cross-appealed, giving timely notice of such cross-appeal, on the grounds that it was entitled to attorneys' fees because its constitutional civil rights had been violated.

This Court found that the court below was wrong in its statutory construction, and that the proper construction would not exempt sales of *Arkansas Times. Arkansas Times* will not reargue this point. However, this Court then made the statements quoted above, apparently overlooking the facts that the constitutional issues were raised and extensively briefed and argued at every phase of this litigation, including before this Court, and that the cross-appeal was based upon the constitutional arguments. The *Arkansas Times* is entitled to have the constitutional issues and its cross-appeal considered, and that is why this Petition For Rehearing is made.

Respectfully submitted,

/s/ Anne Owings Wilson
Attorney for Appellee/
Cross-Appellant

IN THE SUPREME COURT OF ARKANSAS

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS

Appellant

ARKANSAS WRITERS' PROJECT, INC.

Appellee

NO. 85-115

APPELLANT'S RESPONSE TO PETITION FOR REHEARING

(Filed October 28, 1985)

Appellee's Petition violates Supreme Court Rule 20(e) and should be denied.

Appellee alleges this Court was in error in finding " . . . neither Party has questioned the constitutionality of the (tax) exemption" and " . . . our disposition of the direct appeal makes it unnecessary for us to reach the cross-appeal." Appellee argues that various constitutional issues were in fact raised and since the cross-appeal is based on constitutional arguments, the cross-appeal must be considered.

Appellant agrees that the record reflects numerous references to constitutional rights. However, when these references are considered *in context* of the entire record, it is obvious that at no point in the proceedings was the constitutionality of the statute per se questioned or placed at issue. Appellee merely argued Appellant's interpretation and application of the tax exemption statute resulted in the abridgement of various constitutional rights of the Appellee and not that the statute itself was unconstitu-

tional. It is easy to see why the Appellee framed its arguments in the posture that the interpretation violated constitutional rights rather than the statute itself being constitutionally invalid. If the statute was found to be unconstitutional then there would be no exemption from tax for the sale of *any* magazines and Appellee's refund denied.

Appellee had "no arguments with the Chancellor's statutory construction" (Abstract and Brief of Appellee, p. 2) and only referenced constitutional rights in its cross-appeal as a vehicle to claim entitlement to attorney's fees. Again the constitutionality of the statute itself was not at issue. Furthermore since Appellee has failed to prevail in its action, no attorney fees can be granted under 42 U.S.C. §1983 and the cross-appeal was correctly not considered.

Appellee's Petition should be denied as being derogation of Rule 20(e) and on the merits.

Respectfully submitted,

/s/ Joseph V. Svoboda